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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., ETC. ET AL.,
Respondents.

THE HON. ROBERT K. SMITH, JUDGE, ET AL., ETC.,
Petitioners,

v.

DON MARSH, ET AL., THE DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of Respondents,

urging affirmance of the decision of the Supreme Court of Appeals of West Virginia. Although the attorneys for Respondents have consented to ANPA's filing a brief amicus curiae, the Petitioners have withheld consent.

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1324 newspapers representing more than 91 percent of the total daily and Sunday newspaper circulation in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper business and, over the years, ANPA on several occasions has presented its views to the Supreme Court of the United States and to other federal and state appellate courts. ANPA numbers eighteen members in the State of West Virginia.

In its efforts to stay abreast of the broad realm of matters affecting the people of our country as served by our newspaper members, and the journalists who work for them, ANPA is ever vigilant to protect the public's right, under the First Amendment, to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers under our value system; namely, the dissemination of information which is of vital interest to the public.

In the case before this Court, the state of West Virginia has imposed a system of prior restraint aimed specifically at newspapers and only at newspapers. The statute in question requires newspapers to apply to a court for prior permission to publish constitutionally protected information in which the public has a legitimate interest. The statute in question is without any standards to guide the censoring authority and requires no assessment of its effectiveness prior to imposition of

a restraint on publication. Moreover, the statute unconstitutionally discriminates against newspapers in allowing broadcasters and other print media to publish the name of a juvenile involved in delinquency proceedings, while denying that same right to newspapers.

In view of the importance of the issues raised in this case ANPA desires to present to this Court, for its assistance, the Association's views in regard to the significant legal questions involved in this proceeding.

WHEREFORE, the American Newspaper Publishers Association respectfully requests this Court to grant this motion and permit ANPA to file the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association submits this brief amicus curiae in support of Respondents, Daily Mail Publishing Co., Don Marsh, The Daily Gazette Co., et al.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1324 newspapers constituting over 91 percent of the total daily and Sunday newspaper circulation, and a significant portion of the weekly newspaper circulation, in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper business, and on several occasions over the years ANPA has presented its views on such issues, as an amicus curiae, to the Supreme Court of the United States and to other federal and state appellate courts. At present there are eighteen ANPA members in the State of West Virginia.

ANPA is greatly concerned about the enactment and existence of various state statutes which dictate to the press what matters of public interest may or may not be published; which subject the exercise of protected press freedoms to prior censorship at the hands of judges or other governmental officials; and which expose American newspapers to criminal convictions for the truthful publication of newsworthy information that has been obtained legally.

Because of these concerns and the potential erosion of First Amendment freedoms posed by the existence of state statutes such as West Virginia Code 49-7-3, ANPA respectfully presents for consideration by this Court its views on the very significant issues raised in this proceeding.

Questions Presented

I. Whether under the decisional authorities of this Court West Virginia Code Section 49-7-3 constitutes an unlawful prior restraint on constitutionally protected speech.

II. Whether West Virginia Code Section 49-7-3 is unconstitutional on its face for lack of ascertainable standards and may therefore be ignored with impunity.

III. Whether the statute in question is constitutionally deficient for failing to require the censoring authority to assess the effectiveness of a prior restraint on publication.

IV. Whether the statute violates the equal protection clause of the Fourteenth Amendment in requiring that only newspapers obtain court permission prior to publication while the broadcast and other print media are free to disseminate a juvenile's name.

Constitutional and Statutory Provisions Involved and Statement of the Case

ANPA adopts the constitutional and statutory provisions involved and statement of the case as set forth in the brief of Respondents. Additionally, ANPA asserts that the statute in question is violative of the Equal Protection clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

West Virginia Code 49-7-3 imposes an unlawful prior restraint on publication of information of legitimate public concern—the identity of a juvenile alleged to have fatally and feloniously shot a classmate while attending classes at a local

public high school. Petitioners assert that maintaining the confidentiality of a juvenile offender's identity through a restriction on publication by newspapers serves to effectuate that juvenile's "right to rehabilitation" and therefore outweighs any countervailing First Amendment values. Nonetheless, the juvenile offender's so-called right to rehabilitation, which some courts now regard as correspondent to the Constitution's prohibition of cruel and unusual punishment and requirement of due process, see *Martarella* v. *Kelly,* 349 F. Supp. 575, 585 (S.D.N.Y. 1972), heretofore has never been held sufficient to exempt a State from the fundamental doctrine against prior restraints on publication. See *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976). Moreover, even assuming that the state policy of rehabilitation rather than punishment, of its juvenile offenders is "paramount, one of vital importance," *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976), Petitioners have presented no evidence to show that West Virginia Code 49-7-3 is "necessary, and not merely rationally related, to the accomplishment of [that] policy." *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964). If publication of the identity of a juvenile offender endangers his allegedly paramount right to rehabilitation, "[t]he danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney,* 331 U.S. 367, 376 (1947).

There can be no doubt that the statutory scheme before this Court, both on its face and in effect, operates as a restraint on publication since it "undertakes to prevent future publication without advance approval . . . [and is] enforced by criminal prosecution for having published without the required approval." Emerson, *The Doctrine of Prior Restraint,* 20 LAW AND CONTEMP. PROB. 648, 655 (1955). But "[i]t is settled by a long line of . . . decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an

unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *Baxley,* 355 U.S. 313, 322 (1958).

For, where a statute imposes a prior restraint upon expression without providing objective and definite standards to guide the licensing or censoring authority, under the First and Fourteenth Amendments to the Constitution, parties subject to such authority "may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147, 151 (1969).

In *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976), this Court struck down a gag order prohibiting the particular content of publication on the ground, *inter alia,* that the size of the small community affected and other practical problems placed the efficacy of the order in grave doubt. West Virginia Code 49-7-3 is similarly deficient in failing to explicitly require, prior to its application to a specific publication, an assessment of its probable effectiveness in preserving a juvenile offender's allegedly compelling right to rehabilitation.

Your amicus respectfully submits that the statute in question also violates the equal protection clause of the Fourteenth Amendment in requiring that only newspapers obtain court permission to publish although the broadcast and other print media are free to disseminate a juvenile's name without prior approval. Differential treatment among various media of expression is permissible only if "reasonable and applied without discrimination." *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367, 387 (1969); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949). The differential treatment directed at newspapers by West Virginia Code 47-7-3 is manifestly unreasonable and discriminatory since no legitimate state purpose is served in prohibiting only one medium from disseminating the name of a juvenile, particularly where the broadcast media may reach a much broader audience.

ARGUMENT

As stated by Respondents, the legal issue involved in this case is whether a newspaper's truthful publication, in violation of a criminal statute, of the name of a juvenile who is suspected in the homicide of a local high school student and who is the subject of juvenile court proceedings is protected speech under the First Amendment of the United States Constitution. This case does not involve the allegation that the Respondent newspapers unlawfully obtained the identity of the juvenile suspect. Nor does this case involve the scope of a state's power to deny access to juvenile court proceedings[1] or to punish participants in said proceedings for violating a mandate of confidentiality.

As stated by this Court in *Mills* v. *Alabama,* 384 U.S. 214, 218-19 (1966),

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of governmental affairs.

See also Cox Broadcasting Corp. v. *Cohn,* 420 U.S. 469, 491-92, 94 (1975); *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964); *New*

[1] Your amicus agrees that in the presence of a compelling interest, it may be permissible for the state to attempt to preserve the confidentiality of certain information by limiting the access of the press to the sources of such information. *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974). Furthermore, this Court has held that the press enjoys no greater right of access than that of the general populace. *Houchins* v. *KQED, Inc.,* ____U.S.____, 57 L.Ed 2d 553 (1978). ANPA strongly asserts, however, that it is unconstitutional to prohibit publication of information, no matter how such information is obtained. *Nebraska Ass'n* v. *Stuart,* 427 U.S. 539, 570 (1976) (Brennan, J., concurring). It is similarly unconstitutional to punish, by criminal sanction, the publication of "information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming." *Landmark Communications Inc.,* v. *Virginia,* ____U.S.____, 56 L.Ed. 2d 1, 17 (1978).

York Times Co. v. *Sullivan,* 376 U.S. 254, 270 (1964). Your amicus respectfully submits that, as a general matter, the operations of the local juvenile court system in its effort to cope with the increasing problems of youth crime and juvenile delinquency are "governmental affairs" of public interest to citizens within the affected community. More specifically, the apprehension, incarceration, judicial disposition, and *identity* of a local juvenile alleged to have fatally and feloniously shot a classmate while attending a local public high school are undoubtedly matters which legitimately concern students and adults alike and constitute protected speech under the First Amendment.

Counterposed against the constitutional right to publish the identity of a suspected murderer is the juvenile suspect's so-called "right to rehabilitation," asserted herein by the state acting in its *parens patriae* role.[2] Petitioners contend that a vital aspect of the process of rehabilitating juvenile offenders is maintaining to the greatest extent possible the confidentiality of the juvenile's name. It is contended that focusing public attention on a juvenile miscreant hampers that juvenile's efforts to reintegrate himself into lawful society and to lead a normal life. Petitioners maintain that, rather than serving as a deterrent to further delinquent behavior, publication of the names of juveniles involved in delinquency proceedings handicaps the

[2] In 1899 the Chicago Bar Association described the function of a state juvenile court system acting in its *parens patriae* role:

> The fundamental idea of the juvenile court law is that the state must step in and exercise guardianship over a child found under such adverse social or individual conditions as to develop crime .... It proposes a plan whereby he may be treated not as criminal or legally charged with crime, but as a ward of the state, to receive practically the care, trust and discipline that are accorded the neglected and dependent child, and which, as the State acts, shall approximate as nearly as may be that which should be given by parents. R. Pound, "The Juvenile Court and the Law," National Probation Association Yearbook, 1944, Vol. 1, No. 3, p. 13.

juveniles' ability to obtain employment and earn the respect and confidence of the local community. Thus, Petitioners contend that, by barring publication, the state's efforts at successful rehabilitation of its wayward juveniles are enhanced to a degree sufficient to outweigh the abridgement of First Amendment freedoms imposed by West Virginia Code 49-7-3.

Petitioners urge this Court to endorse the decision in *Government of Virgin Islands* v. *Brodhurst,* 285 F.Supp. 831 (D.C. Virgin Islands, 1968). There, the United States District Court for the Virgin Islands held "that the advantages accomplished by the shielding of the names of juveniles from publicity outweighed those gained by allowing the publication of the names of children, [and that] [t]he limitation placed upon the press was justified in light of the interest of rehabilitating juvenile offenders." Brief of the Petitioners at 9. While recognizing the vital need for providing a juvenile court system which can offer effective means of rehabilitating youthful offenders, your amicus respectfully submits that the statutory "right" of juvenile suspects in West Virginia not to have their identities disclosed by newspapers is of no constitutional consequence. It simply is not sufficiently compelling to justify the creation of a new exception to the constitutional prohibition on prior restraints on publication.

I. Under The Decisional Authority Governing Application Of The First Amendment To The United States Constitution, West Virginia Code 49-7-3 Constitutes An Impermissible Prior Restraint On Constitutionally Protected Speech

In *Nebraska Press Ass'n* v. *Stuart,* Mr. Justice Brennan correctly noted:

> [I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication. *Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697, 713 [1930]

427 U.S. 539, 588 (1976) (Brennan, J., joined by Stewart and Marshall, J.J., concurring). Thus, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963).

It also is true, however, that "the [First Amendment] protection even as to previous restraint is not absolutely unlimited." *Near* v. *Minnesota,* 283 U.S. 697, 716 (1930). The established exceptions to such protection against previous restraints upon publication fall into three categories:

> The first two exceptions were that "the primary requirements of decency may be enforced against obscene publications," and that "[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government [for] [t]he constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force . . . .'"

Nebraska Press Ass'n, supra, at 590 (Brennan, J. concurring, citing *Near* v. *Minnesota, supra*).[3]

The third recognized exception, but one which this Court has never actually applied in practice, may arise when our country is at war, during which time "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota, supra* at 716.

Yet, even in a situation of national emergency caused by war, "the First Amendment [will] tolerate absolutely no prior

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[3] These exceptions now have come to be construed as situations involving communications other than "speech" as encompassed within the meaning of the First Amendment. *See, e.g., Miller* v. *California,* 413 U.S. 15 (1973); *Roth* v. *United States,* 354 U.S. 476, 481 (1957); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *New York Times Co.* v. *United States,* 403 U.S. 713, 725-26 (1971) (Brennan J., concurring). Previous restraint upon the freedom of speech encompassed within the First Amendment is permissible only when said speech "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., joined by White, J., concurring). *Cf., Craig* v. *Harney,* 331 U.S. 367, 373 (1947); *Schenck* v. *United States,* 249 U.S. 47, 52 (1919).

It is clear that West Virginia Code 49-7-3 imposes a prior restraint on speech which is protected under both the First Amendment to the United States Constitution and Article 3, §7 of the Constitution of West Virginia.[4] It requires newspapers (and *only* newspapers) to obtain a court order before publishing the name of a juvenile who is the subject of a delinquency proceeding. It also is clear that the alleged violation of a juvenile offender's right to rehabilitation, which Petitioners assert will result from publication of the juvenile offender's identity, does not fall within the traditional exceptions to the ban on prior restraints. The issue which this Court must face, therefore, is whether a juvenile offender's specific right under West Virginia Code 49-7-3 not to have his identity published constitutes either (a) a new right of constitutional dimension which justifies the curtailment of freedom of speech or (b) a compelling state interest which is seriously and imminently threatened by the publication at issue herein and which cannot be accomplished by other means less restrictive of First Amendment freedoms. *See, e.g., McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964); *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960); *Craig* v. *Harney,* 331 U.S. 367, 373 (1947).

[4] No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.

It can be assumed that significant state interests underlie West Virginia's statutory policy of providing a mechanism for the rehabilitation, rather than punishment, of its juvenile offenders. In other jurisdictions the courts have held that juvenile inmates have a constitutional right to rehabilitative treatment. See *Nelson* v. *Heyne,* 491 F.2d 352 (7th Cir. 1974); *Morales* v. *Thurman,* 383 F.Supp. 53 (E.D. Tex. 1974); *Martarella* v. *Kelley,* 349 F.Supp. 575 (S.D.N.Y. 1972); *Inmates of Boys Training School* v. *Affleck,* 346 F.Supp. 1354 (D.R.I. 1972). These courts have held that the minimal treatment required to provide incarcerated juveniles their right to constitutional due process "should, so far as can be reasonably required, be what proper parental care would provide." *Nelson* v. *Heyne,* 491 F.2d 352, 360 (7th Cir. 1974). None of these decisions, however, have held that provision for maintaining the confidentiality of a juvenile offender's identity is either an element of due process or necessary to prevent cruel and unusual punishment.

Nor has this Court definitively decided that a youth confined under jurisdiction of a juvenile court has a general constitutional right to treatment[5] or that a provision such as West Virginia Code 49-7-3 is a necessary element in either a constitutional or a compelling state statutory scheme of rehabilitation.[6]

[5] The primary thrust of this court's decisions in *In re Winship,* 397 U.S. 358 (1970) and *In re Gault,* 387 U.S. 1 (1967) is the desirability, or rather necessity, for accurate fact-finding and adjudicative procedures. *Cf., McKeiver* v. *Pennsylvania,* 403 U.S. 528, 531 (1971) (juveniles not entitled to jury trial).

[6] The fundamental constitutional interest in protecting the press from previous restraints on publication need not be balanced herein against the state's interest in the rehabilitation of maladjusted or delinquent juveniles. It is not contended herein that the numerous elements of West Virginia's juvenile rehabilitation program other than West Virginia Code 49-7-3 conflict with Respondents' First Amendment freedoms. Nor have Petitioners demonstrated that an effective overall program of rehabilitation necessitates keeping the identity of juvenile offenders confidential.

As justification for the prior restraint on publication imposed by the statute in question, Petitioners also advert to the West Virginia state policy of rehabilitation as discussed in *State ex rel. Harris* v. *Calendine,* 233 S.E. 2d 318 (W.Va. 1977). There, the West Virginia Supreme Court of Appeals reaffirmed that a juvenile defendant in a delinquency proceeding is entitled to the procedural protections of the due process clause of the Fourteenth Amendment to the Federal Constitution. *See, In re Gault,* 387 U.S. 1, 24 (1967); *State ex rel. Wilson* v. *Barnbrick,* 195 S.E. 2d 721 (W.Va. 1973); W.Va.Code, 49-5-10 (1975). While noting that "[t]he legislature could choose to punish children guilty of criminal conduct . . . , but as a matter of public policy . . . provided instead for a comprehensive system of child welfare,"[7] 233 S.E.2d at 325, the Court specifically held that because of the fundamental difference between a juvenile status offender and a juvenile criminal offender, the indiscriminate incarceration of status offenders together with criminal offenders violated the status offenders' right to equal protection of the laws, their right to substantive due process, and their right to protection against cruel and unusual punishment. Thus, Petitioners' reliance upon *Harris* is misplaced, for the Court there did not address either the specific state policy contained in West Virginia Code 49-7-3 or the resolution of any

[7] The court nevertheless acknowledged that "[i]t has always been assumed that the Legislature can at any time withdraw some or all of the benefits of this system from children guilty of criminal conduct." 233 S.E.2nd at 326. Thus, although legal proceedings for the adjudication of a juvenile as a "delinquent" must comport with procedural due process, and the incarceration of status offenders under the states' statutory policy of *parens patriae* must afford substantive due process and equal protection of the laws, the court did not hold that either the general right of a juvenile criminal offender to rehabilitation, or his specific right not to have his identity published, is a constitutional protection.

conflict between a juvenile criminal offender's right to have his identity kept secret and the First Amendment rights of anyone else.[8]

In assessing whether West Virginia's policy for the rehabilitation of Stewart Perrock, as advanced by section 49-7-3, outweighs the First Amendment right of newspapers to publish his identity, various factors relevant to this Court's standard of review must be borne in mind. First, this Court has made it clear that laws which regulate activities protected by the First Amendment are not accorded the presumption of constitutionality normally accorded to acts of a legislature. *See United States* v. *C.I.O.,* 335 U.S. 106(1948). Second, statutes regulating constitutionally protected activities must be more than merely rational; the government must have a compelling state interest to justify the curtailment of otherwise protected speech, and the scope of the curtailment must not be greater than reasonably necessary to serve the state's purpose. *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945).

II. Where A Statutory Scheme Requiring Official Permission To Exercise First Amendment Rights Is Unconstitutional For Lack Of Standards, Such Statutory Scheme May Be Ignored With Impunity

Your amicus respectfully submits that the Supreme Court of Appeals of West Virginia correctly concluded that West

[8] In *Landmark Communications, Inc.* v. *Virginia,* ____U.S. ____, 56 L.Ed.2d 1, (1978), the Commonwealth of Virginia argued that criminal penalties against third parties who divulge information regarding confidential proceedings before a state judicial review commission were necessary to insure the effectiveness of said commission, and thereby protect the reputation of its judges and maintain the integrity of its judicial system. Yet this Court held that "neither the Commonwealth's interest in protecting the reputation of its judges, nor in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality." *Id.* at 12.

Virginia Code 49-7-3 imposed a prior restraint upon publication. The language of the statute prohibits publication without explicit court permission:

> Nor shall the name of any child in connection with any proceedings under this chapter be published in any newspaper without a written order of the court.

Review and analysis of the cases decided by this Court and of the theory underlying the doctrine of prior restraint demonstrate that the statute at issue, both on its face and in effect, operates as an unlawful prior restraint on publication.[9] Moreover, it is firmly established that, where a statute imposes a prior restraint without adequate standards, a person faced with such an unconstitutional statute may ignore it and engage with impunity in the exercise of the right of free expression for which

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[9] In Professor Thomas I. Emerson's now famous article, "The Doctrine of Prior Restraint," 20, *Law and Contemp. Prob.* 648, (1955), he sets out four categories, the first of which is pertinent to analysis of the case at bar. Professor Emerson states:

> The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official. Such limitations are normally enforced by criminal prosecution for having published without the required approval, the prosecution being based upon mere failure to obtain approval and not on any issue concerning the content or manner of the publication. Examples of this type of prior restraint are the English licensing laws, motion picture censorship, the requirement of permits for park meetings, and the like. In some cases, the method of enforcement may be refusal by the official to make available government facilities or services, such as in denial of the use of the mails.

Id. at 655.

The statutory scheme in question involves a slight variation. A judicial official rather than an executive official is empowered to grant or refuse approval to publish. But here again, prosecution is based upon "mere failure to obtain approval" and not upon the content or manner of publication.

the law purports to require prior official approval. *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969). "[This] rule seems eminently sound and has not been seriously contested." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 378-79 (1970). *See also, Kunz* v. *New York,* 340 U.S. 290, 293-94 (1951); *Schneider* v. *State,* 308 U.S. 147, 161-62 (1939); *Lovell* v. *Griffin,* 303 U.S. 444 (1938).

In *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969), this Court held violative of the First Amendment a statute giving a City Commission power to refuse to issue a permit for any "parade," "procession" or "demonstration" where the Commission determined that the "public welfare, peace, safety, health, decency, good order, morale or convenience" were endangered. This result was reached in spite of the Supreme Court of Alabama's attempt to "perform ... plastic surgery upon the face of the ordinance" by holding that, in the future, certain standards should apply. *Id.* at 153-54.

Writing for the Court, Justice Stewart, made an unequivocal finding that a prior restraint existed and that the statute could be properly ignored by those who sought to exercise First Amendment rights. The opinion stated:

> [A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional. "It is settled by a long line of recent decisions of this Court that an ordinance, which like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *Baxley,* 355 U.S. 313, 322.

394 U.S. at 150-51. Justice Stewart went on to say:

> And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.

Id.

This Court reached a similar conclusion in *Hague* v. *C.I.O.*, 307 U.S. 496 (1938). There, a city ordinance purportedly forbade public assembly in parks or streets in the absence of an appropriate permit; such a permit could be obtained only from a local official who was empowered to refuse issuance of the permit if, in his judgment, riots or disturbances would be prevented thereby. The ordinance was struck down as violative of the First Amendment.

In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a Connecticut statute, which required religious groups to obtain approval from a state administrative office prior to soliciting support for their organizations, was held to constitute an unlawful prior restraint on the exercise of First Amendment rights. Speaking for a unanimous Court, Justice Roberts stated:

> But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

310 U.S. at 307.

More recently, in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), this Court struck down as violative of the First Amendment a statutory scheme which enabled a municipal licensing board to deny permission to use a city-leased theater where, in the Board's view, the production sought to be

presented would not be "in the best interests of the community." This standard was held to be lacking in constitutionally required procedural safeguards. Justice White and Chief Justice Burger pointed out in dissent, however, that the standard lease form used by the city required compliance with state and local laws governing obscenity and "in this respect the licensing system [was] not without standards." *Id.* at 564. In the area of obscenity, however, this Court has developed a well established body of constitutional law providing extensive jurisprudential standards for determining when a prior restraint on publication is constitutionally permissible under state law. Reference to that body of law provides state and local administrative authorities and courts with the ultimate standards under which they may exercise their authority to grant or deny use of the theater.

In the case before this Court, there is no analogous body of law to provide a judge in a juvenile proceeding with standards for determining when the name of the accused may be published. Moreover, it seems clear from *Shuttlesworth* that a statute which provides no standards on its face may not be rendered constitutional by "plastic surgery", however skillfully performed, by an appellate court. 394 U.S. at 153-54.

West Virginia Code 49-7-3 requires that a newspaper obtain a "permit" in the form of a court order prior to publishing the name of a juvenile adjudicated delinquent. This statute is without any standards whatever. It therefore allows a judge to act in an arbitrary manner with unfettered discretion in regard to the issuance of orders allowing publication.

The fact that a judicial official rather than an administrative official is the grantor of the "license" provides no basis for distinguishing this statute from the statute held unconstitutional in *Shuttlesworth*. The fear that an administrative official, exercising his discretion in the absence of appropriate standards, may make decisions based on his own predispositions and beliefs is applicable equally to judges. As

Justice Douglas stated in *Chandler* v. *Judicial Council,* 398 U.S. 74 (1970):

> Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

Id. at 137 (Douglas, J., dissenting), *quoted with approval in Laird* v. *Tatum,* 409 U.S. 824, 834 (1972) (Rehnquist, J., mem.). For this reason, judges as well as administrators must be supplied with narrow, objective and definite standards when First Amendment rights are involved.

To distinguish West Virginia Code 49-7-3 on the ground that it involves a judicial rather than an administrative official would be to exalt form over substance. As this Court has recognized, "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 256 (1974).

In view of the foregoing, it is clear that West Virginia Code 49-7-3 imposes an unconstitutional prior restraint on publication by requiring a newspaper to obtain a court order before it may publish, while providing no standards to govern the issuance of such an order. When controls on publication operate in advance through a system of administrative permits, court injunction, or, as here, judicial sanction, delay is endemic. Time is of the essence in "the reporting of news by the media, [for] each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed

information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press Ass'n.* v. *Stuart,* 423 U.S. 1327, 1329 (1975) (Blackmum, Circuit Justice, mem). A prior restraint is more easily imposed, requires less foundation in provable facts, and is less carefully weighed than is the imposition of subsequent punishment. Even the best intended system of advance controls is difficult to administer in a way that fully safeguards First Amendment rights; an ill-intended system easily can be utilized to throttle those rights. "If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish." *Landmark Communications, Inc.,* v. *Virginia,* ____U.S.____, 56 L.ed 2d 1, 17 (1978) (Stewart, J., concurring).

III. West Virginia Code 49-7-3 Is Constitutionally Deficient In Failing To Require, Prior To Its Application, A Showing Of Its Probable Effectiveness In Achieving The State Interest It Is Designed To Serve.

In assessing whether a particular state interest is sufficient to justify the curtailment of free speech, this Court has taken the firm position that, where a prior restraint on publication is involved, the probable efficacy of such a measure must be carefully assessed. In *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976), this Court struck down a gag order prohibiting publication on the ground, *inter alia,* that the practical problems involved placed the efficacy of the order in grave doubt. Chief Justice Burger, writing for the Court, stated:

> Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be

> more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Id. at 567.

Your amicus respectfully submits that a statute prohibiting publication by newspapers of the name of a juvenile offender is similarly ineffective and therefore unconstitutional. Under the terms of West Virginia Code 49-7-3, news media other than newspapers are free to publish the names of juvenile offenders; and all news media evidently may publish other details about a juvenile offender which in a community the size of St. Albans, West Virginia, may be just as identifying as his name—*i.e.,* his address, his parents' names, his school, his photograph, etc. In addition, court reporters, prosecuting attorneys, defense attorneys, and other participants in delinquency proceedings are not subject to this statute and presumably may divulge a juvenile offender's identity with impunity.

The ineffectiveness of this statute in the instant case can be easily demonstrated. The alleged murder occurred in the town of St. Albans, West Virginia, a community of approximately 14,300 people.[10] Many of the residents of this community were personally acquainted with both the accused and the victim. There were seven eyewitnesses to the shooting. News sources for a story published by the Charleston *Daily Mail* on February 10, 1978, included a Lieutenant in the Kanawha County Sheriff's Office, a trooper with the West Virginia State Police, and an Assistant Prosecuting Attorney for Kanawha County. Moreover, the name of the accused had already been made public by the broadcast media on February 9, 1978, prior to publication by the Charleston *Gazette* and *Daily Mail.* In light of these facts, there can be little doubt that the prohibition upon publication contained in West Virginia Code 49-7-3 is ineffective in preserving the anonymity of juvenile offenders.

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[10] Rand McNally Commercial Atlas & Marketing Guide (1977) (estimated population).

Your amicus respectfully submits that, at the time and under the circumstances of Respondents' publications, there was absolutely no evidence that, but for such publications Stewart Perrock's identity would have remained confidential, or that his chances for ultimate rehabilitation would have been diminished in any way. Moreover, the statute in question is constitutionally deficient in failing to require this type of an assessment of the effectiveness of the restraint on publication.

IV. West Virginia Code 49-7-3 Violates The Equal Protection Clause Of The Fourteenth Amendment In Requiring That Only Newspapers Obtain A Court Order Prior To Publication.

The Supreme Court of Appeals of West Virginia found it unnecessary to address the equal protection issue, choosing instead to decide this case on First Amendment grounds. The question of equal protection, however, was argued before that court. In a recent case characterized by a similar procedural posture, this Court utilized as the basis for its decision an argument which was raised but not addressed by the court below. *Regents of the University of California* v. *Bakke,* ____U.S.____, 57 L.Ed.2d 750, 765 (1978).

Your amicus respectfully submits that the West Virginia statute which prohibits all newspapers from publishing the name of juveniles accused of a crime, while permitting the accused's name to be broadcast or disseminated by other individuals, clearly violates the equal protection guarantees embodied in the Fourteenth Amendment. The right to equal protection assures that the government cannot "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U.S. 412,

415 (1920)." *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971). A denial of equal protection is subject to "strict scrutiny" where the classification involved affects "basic civil rights." *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942). Among those rights is the right to publish a newspaper. *Gitlow* v. *New York,* 268 U.S. 652 (1925). This Court has required strict scrutiny whenever a classification is even "closely intertwined" with First Amendment rights. *Chicago Police Department* v. *Mosley* 408 U.S. 92, 95 (1972). *See also NAACP* v. *Button,* 371 U.S. 415, 438 (1963); *Mancuso* v. *Taft,* 476 F.2d 187, 192-96 (1st Cir. 1973). Under this standard, "the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Chicago Police Department* v. *Mosley, supra* at 95. The statute in question clearly fails this test. The state of West Virginia is apparently attempting to prevent the dissemination of the names of juveniles accused of crimes. This objective is in no way "furthered" by prohibiting publication in a newspaper while allowing the name to be disseminated by the broadcast media.

In two cases involving broadcasting regulations, this Court has upheld differential treatment for broadcasters as opposed to newspapers. *See CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973); *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367 (1969). In *Red Lion,* this Court concluded that such differential treatment was warranted because:

> [B]roadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.

Id. at 376.

Your amicus strongly asserts that *Red Lion* and *CBS* are inapposite to the case before this Court. In those cases, federal

regulation of the broadcast media was held permissible on the ground that inherent differences in the technical nature of the broadcast media justified differential treatment under the First Amendment. In the case before this Court, the discriminatory treatment which newspapers receive is arbitrary, irrational, and unrelated to the purposes the statute seeks to achieve. Broadcasting a juvenile's name may well result in greater dissemination than "illegal" publication in a newspaper. The differential treatment afforded newspapers by this statute, therefore, is certainly not based on inherent differences in the nature of the two media. Differential treatment among various media of expression is only permissible if "reasonable and applied without discrimination." *Red Lion, supra* at 387; *Kovacs* v. *Cooper,* 336 U.S. 77 (1949). The differential treatment directed at newspapers by West Virginia Code 47-7-3 is manifestly unreasonable and discriminatory since no legitimate state purpose is served in prohibiting only one medium from disseminating the name of a juvenile, particularly where the broadcast media may well reach a larger audience.

Your amicus does not suggest, that redrafting the statute to include the broadcast media would render it constitutionally permissible. The statute would still violate the First Amendment. We note in passing that all our arguments regarding prior restraints on publication should apply with equal weight to prior restraints on broadcasting. *See Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974).

CONCLUSION

In light of the foregoing, your amicus urges this Court to uphold the ruling of the Supreme Court of Appeals of West Virginia in striking down West Virginia Code, Section 49-7-3 as an unconstitutional prior restraint on the right of a newspaper to publish. Likewise, this Court well might find the West Virginia Statute to be violative of the equal protection clause of the Fourteenth Amendment, in denying to newspapers a right, enjoyed by other media, to fully inform the public.

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